

REMARKS

In the above-identified Office Action, the Examiner has provisionally rejected claims 1, 3 and 6-20 on the grounds of non-statutory obviousness-type double patenting over claims 1-20 of co-pending application 10/628,502. Applicant hereby encloses a copy of a status report from the United States Patent and Trademark Office web site showing the status of the cited application as abandoned. Accordingly, Applicant hereby respectfully requests that this rejection be withdrawn.

Claims 1, 4, 5 16 and 17 have been rejected over Yajima in view of the California Wheat Commission, and further in view of Seika, Shokuhin, Sgrulletta and Song Jinping. The Examiner stated that California Wheat Commission discloses that durum wheat contains from 6-12% protein. Applicant does not dispute this fact, however notes that it has amended the claims so that the claims now all recite that it is the dry pasta flour product that contains from 6-20% (10-18% in claim 11) protein and not simply the one ingredient. The Examiner has also cited Schellhaass et al. as teaching that it would make it obvious to add various amounts of gluten to flour, or to use flours containing various amounts of wheat protein. Applicant notes that Schellhaass teaches the making of wheat based tortillas and other thin bread-like items and confines his teaching to such products as it is the chewiness of the pasta that is most important, something not capable of being contemplated or extrapolated from a wholly wheat composition. . As a result, Applicant does not believe that such teachings would transfer to a pasta product. Thus, Schellhaass should not be used in a finding of non-obviousness of such a pasta product.

The Examiner has cited Sgrulletta et al. as a teaching that it is known to use 60% durum wheat and 40% oat flour in an all wheat pasta. Applicant notes that the oats used in Sgrulletta are naked oats. Naked oats are essentially hull-less oats that are *sui generis* and not a commercial type of oat (see Czapp, herein). Furthermore, naked oats do not tolerate fertilizer, tend to shatter when harvested and can be damaged in the high heat build-up typical of grain storage silos. Thus, naked oats don't grow well, don't harvest well and don't store well. As a result, one skilled in the art would not consider naked oats to be an equivalent of regular oats, nor would he consider a teaching concerning naked oats to be transferable in result to an oat based pasta. Further, as seen in the Gabrovskia article, submitted herewith, naked oats and common oats are different in all of the measured constituents, i.e., ash, fat, proteins, fiber, and thus, one skilled in the art would not consider a teaching related to naked oats to be capable of being transferred to common oats, and certainly it would not be obvious to expect that the prime characteristic of pasta – chewiness – would be present with the low protein content of oats, and in particular, naked oats.

As a result of the above, it is apparent that the cited references do not render claims 1, 4, 5, 16 and 17 unpatentable.

Even assuming that the cited references may be combined and would render the result delineated by the Examiner, they still do not teach the use of more than 50% oat flour. It would not be obvious to go from the 40% naked oat flour taught by Sgrulletta because in doing so one would not know whether the decrease in protein from the oat flour could be made up for by the increase in protein from the wheat flour and/or wheat gluten. Thus, the loss of the matrix generally obtained from the wheat flour must occur in some manner and whether that supplied by the wheat flour would be sufficient is not necessarily predictable. Accordingly, it would be invention when utilizing at least 50% by weight oat flour to make sure that sufficient wheat flour is utilized to provide from 6-20% crude protein to the mixture.

Claims 3 and 6-20 have been rejected as unpatentable over Yajima and further in view of Hunter. The Examiner stated it would have been obvious to use gluten flour in a composition of Yajima along with wheat flour for its known functions of giving structure to bread. However, there is no suggestion in Yajima that the added gluten flour would be compatible with oats. Accordingly, such teaching by Hunter would not, when combined with Yajima, render the subject claim unpatentable. Claims 6-8 require curdlan and the Examiner has stated that Yajima's disclosure of the use of curdlan would also have been obvious. However, Yajima teaches the possible use of grain flour in combination with a whole list of additives, including curdlan. There is no suggestion of the use of both of those ingredients, curdlan and grain flour, with oats, nor any suggestion that either added ingredient would be compatible with oats. Accordingly, the addition of such ingredients should be patentable. Claims 9-20, similarly rejected on these references, should also be patentable insofar as they each depend from a claim which should be patentable by itself, as argued above.

Claims 1, 3 and 11 have been rejected as unpatentable over Lai in view of California Wheat Commission and further in view of Sgrulletta and Song Jinping. Lai teaches a psyllium enriched dough product. It teaches the addition of gluten that gives the baked product strength, stability and height. Further, non-wheat flours, including oat, are suggested as being possible to use alone or in combination. However, Lai teaches a bread product which incorporates a leavening agent. As such, pasta is not encompassed by these teachings, nor would one skilled in the art seek to carry the idea of the use of oats from these teachings, insofar as bread products are sufficiently different from pasta products as to not be in related arts and thus the teachings are not transferable.

Based on the above, the Applicant believes the subject invention as now claimed to be patentable.

Applicant hereby requests reconsideration and reexamination thereof.

With the above amendments and remarks, this application is considered ready for allowance and Applicant earnestly solicits an early notice of same. Should the Examiner be of the opinion that a telephone conference would expedite prosecution of the subject application, she is respectfully requested to call the undersigned at the below listed number.

Respectfully submitted,

WELSH & KATZ, LTD.

A handwritten signature in black ink, appearing to read "Gerald T. Shekleton".

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Date: July 10, 2007

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